Petition

81-1725

No.

Office - Supreme Court, U.S.
FILED
MAR 17 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1981

ROBERT A. LEBOVITZ
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the introduction of evidence of other alleged criminal activity beyond the statute of limitations was so unfairly prejudicial as to violate Rule 403 of the Federal Rules of Evidence, where the trial judge failed to weigh the prejudicial effect against the probative value on the record and failed to issue any cautionary instruction at the time, denied Petitioner the due process of law.

II. Whether the failure to dismiss the indictment where the evidence failed to show the conspiracy charged, where the indictment was duplicitous and the evidence prejudicially and materially varied from the indictment denied Petitioner the due process of law.

III. Whether the refusal to dismiss

mail fraud counts of the indictment where the evidence showed that the mailings were not necessary to or part of the alleged scheme denied Petitioner the due process of law.

IV. Was the unparticularized search of Petitioner's law office without probable cause violative of Amendment IV to the Constitution of the United States.

V. Whether the refusal to dismiss the indictment where the prosecutor wilfully failed to produce material exculpatory evidence to the grand jury denied Petitioner the due process of law, in violation of Amendment V to the Constitution of the United States.

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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

No.

ROBERT A. LEBOVITZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your Petitioner, ROBERT A. LEBOVITZ, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the court of appeals, dated January 21, 1982, affirming the

conviction in the district court (Appendix A, infra, p. 1-19) is reported in F.2d The judgment and probation/commitment order of the district court (Appendix A, infra, p.20-1) was not reported.

JURISDICTION

A petition for rehearing was timely filed with the court of appeals and rehearing was denied on February 11, 1982 (Appendix A, infra, p. 22). A petition to stay the mandate pending certiorari of the Supreme Court was timely filed and an order was entered February 19, 1982 staying the issuance of the certified judgment in lieu of the formal mandate (Appendix A, infra, p. 23). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:
Amendment IV -

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V -

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, United States Code, Section 371

> "If two or more persons conspire either to commit any offense against the United States, or

to defraud the United States, any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered

by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, and such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Rule 403 of the Federal Rules of Evidence

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 404(b) of the Federal Rules of Evidence

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

A. Course of proceedings

On October 28, 1977, as a result of a subpoena served on the law firm of Lebovitz and Lebovitz, directing the production of certain firm checks, medical reports and bills concerning treatment of clients by Jack H. Pincus, M.D., and a chiropractor between October 1, 1972 and September 20, 1977, Petitioner appeared before the grand jury, the subpoena was complied with and the records were produced.

On July 25, 1979, a search warrant was issued for certain premises occupied by the law firm of Lebovitz, Lebovitz and Smith, directing the seizure of a number of files of personal injury claimants represented by members of the firm.

On September 19, 1980, a fourteen-count indictment was returned in the

United States District Court for the Western District of Pennsylvania charging Petitioner, an attorney at law, with conspiring to defraud various insurance companies by submitting false medical reports and bills in violation of 18 U.S.C. §371 and with devising a scheme to defraud insurance companies by submitting false medical reports and bills to various insurance companies and using or causing to be used the mails. 18 U.S.C. 1341.

After pretrial motions to dismiss the indictment and suppress the evidence were denied, Petitioner went to trial before the Honorable Rabe Marsh on December 8, 1980, a jury could not be selected that day and the Court sua sponte granted a mistrial and rescheduled the case.

On January 15, 1981, a jury was selected and trial continued until January 28, 1981, when Petitioner was con-

victed on all counts.

On March 5, 1981, Defendant was sentenced to one (1) year and one (1) day imprisonment and fined Fourteen Thousand ($14,000.00) Dollars and costs.

On March 11, 1981, a timely appeal was filed to the court of appeals. In a panel opinion with one judge concurring, the verdict was affirmed. A petition for rehearing en banc was denied on February 11, 1982. On February 19, 1982, the court of appeals stayed the mandate to March 20, 1982. If during the period of the stay the clerk of the Supreme Court sends notification that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

The within petition for writ of certiorari follows.

B. Relevant facts

A key issue in this case was whether

Petitioner knowingly was a party to an agreement with Dr. Pincus to obtain and submit false and inflated medical bills. Dr. Pincus, an immunized witness, testified that he had never even met Defendant before trial (TR-251). He couldn't state that Petitioner had referred him any cases, that only during the course of treatment his name came out (TR-255). The doctor could not even recall talking to Petitioner as late as 1978 (TR-257). Dr. Pincus stated that on one occasion, he had completed a medical report and bill in front of Louis Kwall, an attorney associated with Petitioner. Dr. Pincus does not believe that he showed him the five by eight (5 x 8) note card and admitted that a person would have to assume that the treatments and the dates reflected on the bill would be in accordance with the dates reflected on the five by

eight (5 x 8) note card (TR-274-5). When asked on redirect examination what Dr. Pincus meant by his statement that he had no explicit agreement with Attorney Lebovitz, Pincus replied, (TR-279),

> "I meant I had no written understanding or verbal understanding of any agreement for inflating bills or personal arrangements or anything like that."

Dr. Pincus has failed to connect the Petitioner with any conspiracy in that Dr. Pincus did not testify that he ever told Mr. Lebovitz that he was inflating bills, or that he was asked by Mr. Lebovitz to inflate bills, nor did he state that he was asked by any member of Mr. Lebovitz's office or told any member of Mr. Lebovitz's office that he had inflated a medical bill or report.

The government argued, since Petitioner had not himself dealt directly with Dr. Pincus, the principal direct

evidence of Petitioner's knowledge and intent was the testimony of Louis Kwall, Petitioner's law partner (Gov. Appellate Br. p. 14).

Kwall testified as a government witness that he anticipated receiving pretrial diversion without prosecution (TR-785). Kwall stated that he had not entered into any agreement with Dr. Pincus to submit inflated bills (TR-775). Kwall further testified that he had no agreement with Dr. Rosenbloom or with Petitioner to obtain and submit inflated bills (TR-766). He stated that to the best of his knowledge he was not even sure that Dr. Pincus' bills were even inflated (TR-775). Kwall under direct examination had explained that he had written in his own handwriting information to assist Dr. Pincus in the preparation of a medical report for Robin Jo Smilack and Pamela Smilack and that

the source of the information had come from Petitioner. On cross examination, at (TR-776), Kwall explains that Petitioner had met with the Smilacks a short time prior to requesting Kwall to obtain the report:

> Q. "And is it true that you believe that the information you were requesting was accurate information and... medical report?"
> A. "That is correct."
> Q. "And in fact you thought you received an accurate medical report, did you not?"
> A. "Yes." (TR-776).

Although Louis Kwall was to be the prosecution's source of principal direct evidence against Petitioner, Kwall's testimony failed to implicate Petitioner in a conspiracy or mail fraud.

The government called Dr. Rosenbloom as its second witness. Dr. Rosenbloom stated there had been no conspiracy within the statutory period. In reviewing the testimony of Meyer A. Rosenbloom, M.D.,

in a light most favorable to the government, Dr. Rosenbloom's testimony is the most prejudicial and harmful testimony against Petitioner (TR-98):

> Q. "Who indicated to you that the bill should be inflated?"
> A. "The word infaltion never occurred to me, but that is what we were doing. But I would say I have a bill for $150.00, and he would say something that the patient may have said he had come more frequently, that a bill for $350.00 was necessary, or was inferred or implied by the patient."

Dr. Rosenbloom, an immunized witness, stated he had been a doctor for forty-one (41) years, that he had pleaded guilty to one unrelated count of mail fraud pursuant to an agreement with the government (TR-92); he testified many bills with Appellant were not inflated (TR-106), Dr. Rosenbloom would fill out the report in his own handwriting (TR-108). He indicated that he had been inflating

bills long before he even knew Petitioner (TR-110); after testifying to four (4) cases, on cross examination, Dr. Rosenbloom had no specific recollection of any of the individuals that he had testified to earlier that morning in Court (TR-132), and when asked:

> Q. "Did you ever talk to Bob Lebovitz about any of those specific individuals?"
> A. "Not by name."

He stated that he had no overall agreement with Petitioner concerning inflation of bills (TR-134); Dr. Rosenbloom further stated that he wouldn't reply to a written request for a written medical report (TR-139), and required a personal contact in the way of a phone call or a visit to obtain medical reports(TR-140). He further stated that he had nothing to do with Jack H. Pincus, M.D., had no agreement or understanding with Jack H. Pincus concerning the inflation of med-

ical bills.

The government called Antoinette Ferri and Denise Stroup, each legal secretaries to Petitioner for over nine years. They denied any wrongdoing on the part of Petitioner, said they wrote and called Dr. Pincus for medical reports and bills. Attorney Robert B. Smith, a principal of the firm, also testified denying any conspiracy or mail fraud on the part of Petitioner or the firm. These witnesses were present on a daily basis, worked in close proximity to Petitioner and believed that they would have been aware of any deals with Dr. Pincus had there been one.

None of the government's witnesses were able to say that Petitioner either told them or that they told Petitioner that any medical report or bill was false or fraudulent. The jury was placed in a position of hearing the

testimony of Dr. Rosenbloom very early in the case, not in rebuttal to impeach anything Petitioner said, but as a lead-off effort to taint Petitioner's character even before the establishment of any conspiracy involving Petitioner.

Petitioner has been recognized by his profession as a highly competent attorney and by his community as an outstanding civic leader. In addition to maintaining a very busy law practice, he was President and Director of his Chamber of Commerce, Rotary Club and served as a Board member on various religious and charitable organizations. Character witnesses testified he had an impeccable reputation in the community.

Other relevant facts will be discussed in the arguments as they pertain to the issues raised.

C. Arguments raised in the courts below

I. The district court's failure to

balance the probative value of the government's offer of Dr. Rosenbloom's testimony against the highly prejudicial effect where Rule 403 was properly raised; its further failure to state any reason on the record for admitting the testimony offered by the government under a dual theory of "part of the conspiracy" or "prior bad acts" Rule 404(b) and its failure to give any cautionary or limiting instruction to the jury at the time denied Petitioner due process of law.

The following parts of the indictment are in issue. (emphasis added)

Paragraph 4

> "It was part of the conspiracy that Defendant ROBERT A. LEBOVITZ would obtain from Jack H. Pincus, M.D. medical reports and bills which misrepresented the nature and extent of medical treatment provided by Pincus to personal injury clients of 'Lebovitz'",

Paragraph 5

> "It was a part of the conspiracy

> that Defendant ROBERT A. LEBOVITZ would obtain from Meyer Rosenbloom, M.D. medical reports and bills which misrepresented the nature and extent of medical treatment provided by Rosenbloom to personal injury clients of 'Lebovitz'."

Paragraph 7

> "It was part of the conspiracy that Defendant ROBERT A. LEBOVITZ would and did pay to Jack H. Pincus, M.D. and Meyer Rosenbloom, M.D. portions of the proceeds received in settlement of insurance for said clients of 'Lebovitz'."

When the government called Dr. Rosenbloom as the second witness in the trial, defense counsel requested an offer of proof before his testimony. Thereafter, based on the offer and the Jencks Act material previously provided to counsel, Defendant objected to Dr. Rosenbloom's testimony on the ground that it appeared that any participation he had with Defendant in any possible scheme to defraud insurance companies had terminated in 1975, well beyond the statute of lim-

itations, and that Dr. Rosenbloom had no connection whatever with Dr. Pincus, so that his acts, if anything, constituted a separate conspiracy (TR-76-88).

The government urged that the Rosenbloom testimony on his overt acts was admissible as part of the conspiracy within the statute of limitations (TR-81); and also,

> ". . . I suggest to the court that even if it appears at the end of the trial that Rosenbloom should not have come in as part of the conspiracy . . . that Dr. Rosenbloom's scheme is identical to Dr. Pincus' scheme. . ." (TR-82).

The government stated (TR-86):

> ". . . Dr. Rosenbloom's testimony is going to be identical to Dr. Pincus in terms of scheme that was carried out, the method it was carried out. . ."

Counsel for Appellant advised the Court (TR-87):

> "You have to determine whether or not it is prejudicial, and whether the prejudicial value outweighs the probative value, and in order to make that determination you need a more detailed offer. My reading

> of the Jencks material on both individuals is that it was not the same kind of arrangement at all with them, and, in fact, Dr. Pincus never met with Mr. Lebovitz or had any discussions with him whatever. That is completely contrary to the testimony proferred from this witness. His testimony would be more prejudicial than the testimony of Dr. Pincus who does not testify to this kind of scheme at all. He says he submitted inflated bills."

The court simply overruled Defendant's objection with no reason given (TR-88). There was no indication as to whether the testimony was admitted as being part of the conspiracy or under Rule 404(b). Additionally, there was no articulation of a balancing of prejudice versus probative value by the court and no cautionary or limiting instruction was given.

It eventually became apparent that Dr. Rosenbloom could not be connected to a conspiracy involving Dr. Pincus and Defendant and, in fact, the govern-

ment finally so conceded (TR-806). Counsel argued that a mistrial should be granted because it had been highly prejudicial to admit Dr. Rosenbloom's testimony under the circumstances of this case (TR-1287).

The court replied,

> "I agree with you, but I wasn't admonished as you are admonishing when they called Dr. Rosenbloom. . . You're going to get a verdict of not guilty. What's the difference?" (TR-1287)

Had the court made a reasoned analysis on the record, or even stated the basis for its ruling, Petitioner could have asked for an immediate cautioning or limiting instruction, if the court did not automatically give one. It is a general rule that where evidence is admitted for a limited purpose only, as evidence under 404(b) is, it is plain error, in the absence of manifest waiver, to omit an immediate cautioning instruc-

tion. United States v. McClain, 440 F.2d 241, (D.C., Cir. 1971). However, even an immediate cautioning instruction would not salvage an abuse of discretion by the trial court, but it would be a factor to be considered in assessing prejudice. Government of Virgin Islands v. Toto, 529 F.2d 278, (3 Cir., 1976)

The protection which Rule 403 establishes was totally ignored in this case. There is nothing on the record to reflect a reckoning of the balance between relevance and prejudice and the alternatives available for the substitution of less prejudicial proof. As noted by defense counsel at the time the Rosenbloom offer was made, a more detailed offer would have had to be made to enable the judge to determine whether the probative value of the testimony outweighed the prejudicial value (TR-87). Because the court did not accept that suggestion, it was

without sufficient information to make a reasoned analysis and did not, in fact, make any analysis.

To affirm the trial court requires a post hoc rationalization. In other contexts, such rationalizations have been held not to be acceptable substitutes for reasoned decision making in the first instance. S.E.C. v. Chenery Corp., 318 U.S. 80, Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705, 702 - 712, (D.C. Cir. 1977).

The clear language of United States v. Long, 574 F.2d 761, 766 (3 Cir.) cert. denied 439 U.S. 985 (1978) was not followed.

> "Where an objection does involve Rule 403, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal."

The reasoning of United States v. Herman, 589 F.2d 1191 (3 Cir. 1978) was not followed. The government in its case

in chief attempted to introduce the testimony of Jacob Winner, a bail bondsman, that he paid the defendant magistrates 50% on bonds he posted where they had fixed bail. The trial court ruled Winner's testimony inadmissible. It was subsequently allowed in rebuttal under Rule 608.

The Appellate court rejected the admission as rebuttal evidence under Rule 608 and also rejected the government argument that the testimony was admissible under 404(b) when it was offered as part of the prosecution's direct case. The court, at p. 1197:

> "Winner's testimony, it is said was probative of McCann's participation in a common scheme or plan, and of the modus operandi of that plan. However, the indictment charges a common plan with the Levitt Agency only. It is true that the modus operandi of the Winner offenses was in some respects similar to that of the Levitt offenses. But the evidence must still be evaluated under Rule 403 for

> undue prejudice, confusion of issues, and needless presentation of cumulative evidence. . ."
> ". . .What was centrally in issue was whether McCann was the kind of person who would take a bribe. The Winner testimony, if believed, tended to show that McCann was just such a person. Its effect was thus highly prejudicial to his defense. Since the probative value of the evidence as modus operandi testimony was clearly outweighed by its prejudicial effect on McCann's character defense, we hold that it was proper to exclude the evidence when it was offered in the government's direct case, and that its admission on an impermissible theory in rebuttal was not harmless error."

The court of appeals acknowledges that this was an appropriate case in which the trial court should have articulated the factors considered to the extent that his exercise of discretion may be fairly reviewed on appeal (App. A, p. 15). The court of appeals concludes that the trial judge must have adopted the 404(b) theory to show intent since he rejected the government's con-

spiracy theory when ruling on the motion for mistrial (App. A, p. 16).

The concurring opinion admonishes the trial court that where there is no balancing on the record, an appellate court is required to make "after-the-fact speculation" (App. A, p. 18). "Trial judges likewise should indicate on the record that they have engaged in the requisite balancing process" (App. A, p. 19). Petitioner challenges the reasoning that because the trial judge took a ten minute recess after argument, that he ". . .therefore must have considered the issue." (App. A, p. 18)[1]

It is respectfully submitted that the modus operandi of the Rosenbloom

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1. The recess lasted from 10:45 a.m. to 10:55 a.m. (TR-89). The record bears out that this was a customary time for normal recess. A fifteen or twenty minute recess was called the next day (TR-300) and court resumed at 11:10 a.m. A recess was held again at 10:45 a.m. (TR-481) and court resumed at 11:10 a.m. (TR-482).

arrangement was not so similar to the Pincus practice to justify an inference that even if Defendant agreed to submit false bills with Dr. Rosenbloom, he must have known Dr. Pincus' bills were inflated. The probative value of the testimony was minimal.

The trial court faced with the collapse of the conspiracy theory was left only with the 404(b) theory of "prior bad acts". The testimony offered was simply too prejudicial to stand without the protective balancing and limiting instructions required.

II. The evidence which showed two unrelated conspiracies fatally varied from the indictment which charged a single conspiracy.

Count one (conspiracy) charged that Petitioner conspired with Dr. Rosenbloom and Dr. Pincus;on accident cases (overt acts) with Dr. Pincus (p. 17, 18 supra).

There was no need to request a Bill of Particulars. The government contended before the court of appeals (Br. p. 10) that there were two conspiracies: one with Kwall, Lebovitz and Pincus, and the other with Kwall, Lebovitz and Rosenbloom.

Rule 8(a) of the Federal Rules of Criminal Procedure permits the joinder of two or more offenses in the same indictment, but requires that each be stated, in a separate count. The indictment is duplicitous which is reversible error. United States v. Starks, 515 F.2d 112 (3 Cir. 1975), 431 U.S. 65 (1977).

The court was obviously confused by the indictment, but finally concluded that the government had intended to charge and prove one conspiracy involving both Dr. Pincus and Dr. Rosenbloom. (TR-1295)[2]

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2 Twice the court commented that it had never seen the like of it before, (TR-806,878) The Court: "Lots of government lawyers offer

The court finally asked the government who it alleged were co-conspirators (TR-806). The government conceded that the evidence would only support a conspiracy between Dr. Pincus, Louis Kwall and Petitioner (TR-806). Petitioner suffered serious prejudice because the Rosenbloom testimony went to the heart of his defense. Unlike the case in United States v. Sir Kue Chin, 534 F.2d 1032, (9 Cir. 1976) the two conspiracies here could not have been separately charged in the same indictment because the Rosenbloom charges were barred by the statute of limitations. Petitioner's conviction should be reversed due to the prejudicial material variance in failing to prove the conspiracy charged. United

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to prove certain things, and then they don't prove it. I don't think he proved a conspiracy between Mr. Lebovitz and Dr. Rosenbloom. I think he wanted to at one time, or whoever drew up that indictment probably wanted to. It is the most outrageous indictment I ever saw. . ." (TR-1295)

States v. Coward, 630 F.2d 229, (4 Cir. 1980), Kotteakos v. United States, 328 U.S. 750 (1946) The court of appeals declined to discuss the issue.

III. The evidence failed to establish that the mailings in counts five, ten, thirteen and fourteen were related to the alleged scheme.

Count five of the indictment referred to a letter dated August 18, 1976, containing Plaintiff's answers to interrogatories sent from Nationwide Insurance Company's attorney to Nationwide's adjuster.

Petitioner represented Sharon Campbell (driver) and Ann Baumeister (passenger) in a claim against Nationwide, Baumeister's insurance company, for medical payments. Nationwide had received all the medical reports and bills prior to payment on December 16, 1974 (TR-550). That payment concluded the

claim for medical payments filed. Nationwide's continued interest in the case, reflected by the letter referred to in the indictment, concerned the claim of the original defendant Corradini against the additional defendant Campbell and that claim was made by the original defendant's attorney.

The object of Petitioner's alleged scheme had been accomplished when he received the check of December 16, 1974. The mailing in count five was, therefore, not sufficiently related to the scheme to support a mail fraud conviction.

Baumeister and Campbell in sworn affidavits alleged the accident was solely the fault of Corradini, who backed a car from a shopping center parking stall into the Baumeister vehicle. The physical facts, Nationwide's independent investigation confirmed that there was no realistic belief that Campbell was

liable. Insurance companies can join additional defendants to attempt to obtain a small contribution even if only the costs of defense. Petitioner's firm was advised that Nationwide refused to contribute anything for Campbell as additional defendant. The case was tried on Baumeister's claim in Arbitration without Dr. Pincus' bill or report and verdict was against only the original defendant.

Counts ten, thirteen and fourteen all deal with the claims of John Sochacki (driver) and Joan Posa (passenger). The mailings in these counts also concern the claim of the original defendant against Sochacki, additional defendant. Posa was severely injured in her face and nose with several thousand dollars in medical bills. She required nasal surgery, repair of damaged front teeth and was treated for neck and back in-

juries by a rehabilitation expert, also had independent therapy treatments. Dr. Pincus provided a bill of $200.00 covering treatment from 4/3/75 to 6/26/76. His bill showed twelve treatments. Although Posa joined with Sochacki in their complaint alleging the defendant Joyce was solely at fault, Sochacki's insurance carrier made a $1,000.00 contribution in a settlement in 1979. These cases were pending at the time of the subpoena issued to Petitioner's law firm in 1977. Subsequently, Campbell, Baumeister, Posa and Sochacki were confronted with the reports and bills by Petitioner. All confirmed the treatment as accurate in writing across the itemized bill. On this basis, Petitioner pursued the claims. The crux of the mail fraud counts 6-14 include the mailing of the confirmation of settlement, the release and receipt of settle-

ment draft.

Sochacki consulted Dr. Pincus prior to knowing Petitioner. On one case, Petitioner had previously paid Dr. Pincus $170.00 on a Sochacki claim which Dr. Pincus verified as an accurate bill (TR-238). John Sochacki and Joan Posa testified at Petitioner's trial that they had received all of the treatment reflected in Dr. Pincus' bills.

The gist of the crime of mail fraud is the use of the mails for the purpose of executing a scheme to defraud. United States v. Tarnopol, 561 F.2d 466, 471, (3 Cir. 1977), United States v. Maze, 414 U.S. 395, 400 (1974).

The mailings in question must be closely related to the scheme to bring the conduct within the statute and the completion of the scheme must depend in some way on the mailings charged. United States v. Brown, 583 F.2d 659, 664 (3

Cir. 1978), cert. denied 440 U.S. 909 (1979).

The court of appeals concluded that Nationwide had an interest in the Baumeister claim (App. A, p. 9,10). Baumeister's potential claim against Campbell was predicated upon liability and upon Baumeister's proof of injuries and work loss. Although the claim was not realistically viable, Nationwide, even if it could be convinced that it had exposure as to liability, would have resisted because Dr. Pincus was a treating physician. Sam Bruno, Nationwide claims attorney, testified concerning the Baumeister case,

> ". . .If those bills were from Dr. Pincus, I would have questioned them, yes" (TR-62).

The mailings failed to further any possible scheme; failed to "lull" victims into inaction or to conceal the scheme and tended to frustrate any

possible scheme United States v. Tarnopol supra.

IV. The warrant for the search of Petitioner's office was issued without probable cause without particularity and was a general search in violation of Amendment IV to the United States Constitution.

On July 26, 1979, numerous client files were seized, involving a general search of Petitioner's law office, which were introduced at trial. The search continued into the locked basement storage area used by three separate corporations and individuals not involved in the search, including many confidential personal credit files. Postal inspectors had the opportunity to review the private confidential documents of numerous clients and parties dealing with the other corporations using the storage facilities.

The warrant fails to set forth any dates limiting the search. Paragraph 8 of the search warrant affidavit identifies 25 individuals for whom it is alleged Dr. Pincus identified as having prepared false and/or inflated medical bills and physicians reports during the period from 1969 to 1975. It is noted in the search warrant affidavit that 11 of the 25 individuals had previously been identified from subpoenaed records of the law firm. Files were seized in their entirety by name and the seizure of records was not limited to ". . . reports and bills, . .correspondence and other records and documents associated with the preparation and presentation of the personal injury claims of said claimants" set forth in the search warrant.

The affidavit failed to provide a reasonable basis for the magistrate to

infer that any member of Petitioner's law firm had knowledge that the medical bills of Dr. Pincus were false and inflated and knowing that, submitted them to insurance companies to increase the value of a case. There was not sufficient cause to believe that documents evidencing the commission of any crime were on the premises.

The lower court denied the motion to suppress and found that the information in one paragraph of the affidavit was sufficient to support an inference of knowledge by a member of the firm. That paragraph is as follows:

> "Dr. Pincus was interviewed on June 28, 1978, and July 20, 1979, and advised that in 1969 or 1970 he began treating patients that were referred to him by Attorney Robert Lebovitz and Louis Kwall of the Lebovitz, Lebovitz and Kwall Law Firm. The patients were involved in accidents and represented by the law firm in their claims against insurance companies. Dr. Pincus stated that he furnished the Law Firm

> of Lebovitz, Lebovitz and Kwall false and inflated medical bills and physicians reports relative to purported injuries and treatment of the patients represented by Robert Lebovitz and/or Louis Kwall. Dr. Pincus further stated that on occasions (two or three times) Louis Kwall came to Dr. Pincus' office to obtain bills and physicians reports on clients represented by Lebovitz, Lebovitz and Kwall. Dr. Pincus stated he prepared inflated bills and reports in the presence of Attorney Kwall by recording treatment dates selected at random from a calendar."

The inference is more than the information supplied warrants. It is not reasonable to infer that because treatment dates were randomly selected from a calendar in his presence that Kwall knew that the selection was random and did not coincide with actual visit dates or that he knew that they did not coincide with the actual number of visits, if not the actual dates.

When the entire affidavit is reviewed, it becomes apparent that there was no information anywhere to support

an inference of knowledge that Dr. Pincus was submitting false bills.

Paragraph five of this affidavit referred to an affidavit and warrant in another case, United States v. Mark Hunter, in which information provided by Dr. Pincus in a mail fraud scheme was reviewed and found satisfactory by another court.

The lower court said this paragraph could be disregarded without affecting the probable cause to search, but that misses the point.

It is obvious that reference to the Hunter affidavit was made to suggest that the same or similar information as that provided here had previously been found sufficient by another court. However, a review of the Hunter affidavit reveals that specific agreement was alleged between Dr. Pincus and Hunter for Pincus to supply false medical bills to Hunter

on patients referred to him by Hunter. That kind of agreement obviously reflects knowledge. The fact that Dr. Pincus did not have that kind of agreement or did not relate that kind of agreement obviously reflects a lack of knowledge. The significance of the paragraph lies in what it does not say rather than what it does.

Paragraph six was obviously intended to suggest that Lou Kwall knew that Dr. Pincus was submitting false bills, but is it reasonable to assume Pincus would have made such an equivocal statement if he could have made a more definite one? He certainly did not equivocate in the Hunter affidavit and he was cooperating with the government at this time to help himself in his own mail fraud conviction.

The reasonable inference to be drawn from the entire affidavit is that

Pincus did not say that Kwall knew that he was submitting false bills because he could not. The evidence of knowledge available to him was insufficient to justify that conclusion. A fortiori, if a party to the affair could not say that Kwall had knowledge, a reviewing magistrate could not.

The reference to the Hunter affidavit was also a material misrepresentation because it suggests that the same or a similar affidavit had previously been found sufficient to grant a search warrant when the affiant well knew there was a substantial and critical difference in the two situations.

The misrepresentation was critical because it suggested that the warrant had already received the imprimatur of a reviewing court, seeking to influence the issuing magistrate with the judgment of another court. Cf. Coolidge v. New

Hampshire, 403 U.S. 443 (1971).

The court did not disagree with the contention that this reference was a misrepresentation, but it held that it was not material because the paragraph could be deleted without affecting probable cause. However, deleting this paragraph leaves only paragraph five to justify the warrant and that, as noted, is insufficient.

The Fourth Amendment requirement that a search warrant particularly describe the place to be searched and the persons or things to be searched is designed to prevent general exploratory searches. The problem posed by the general warrant is not of intrusion per se, but of a general exploratory rummaging in a person's belongings. Coolidge v. New Hampshire, supra.

Given the exhaustive list of items to be seized, there is no way the author-

ities could be sure that they had found all of the items to be seized unless they searched through all the files in the firm. Even if it were possible to meet the particularity requirement regarding the place to be searched, the file itself would still contain some confidential information that may be immune from seizure under the attorney-client privilege or the work product doctrine.

While there may be no justification for the establishment of a separate Fourth Amendment for the search of a lawyer's office, the magistrate should take note of the special interest involved. Cf. Zurcher v. Stanford Daily, 436 U.S. 547 (1978), rehearing den. 439 U.S. 885.

In assessing the sufficiency of the affidavit and the reasonableness of the warrant, the court should carefully consider all the circumstances of this

particular case. It should consider that a subpoena had been used previously in the investigation, and it had been fully complied with by the firm. It should consider that there was no reported threat that any records or documents requested would have been destroyed by the firm. It should consider that the firm had no Fifth Amendment privilege to resist the production of any documents. See Bellis v. United States, 417 U.S. 85 (1974).

Andresen v. Maryland, 427 U.S. 463 (1976), which was relied on by the lower court, is not dispositive of the issues raised here. Andresen, in fact, supports the contention that the special interest involved in the search of clients' files in a lawyer's office requires that a warrant for such a search receive special scrutiny and that alternative methods of obtaining the desired material should be

considered. The court in Andresen compares such a search to a wiretap and suggests that in both cases, investigators have a duty to minimize unwarranted intrusions upon privacy. Id.,note 11

If the desired material can be obtained by a less intrusive method than a search of all the files, as it apparently could have been here, that should be the required procedure to follow, as it is in the case of a wiretap.

It is respectfully submitted that when the very expansive language of the warrant is looked at in light of all of the circumstances of this case, it clearly reflects a desire to engage in the broadest search possible. That type of search is violative of the Fourth Amendment. The court of appeals declined to discuss the issue.

V. The indictment should have been dismissed because the prosecutor failed

to produce evidence negating guilt to the grand jury.

During the course of the investigation of this case, client/patients of Petitioner and Dr. Pincus were interviewed and allegedly told the postal inspectors that their medical bills from Dr. Pincus were true and correct. These witnesses were not called to testify before the grand jury.[3]

Two legal secretaries of the law firm were also interviewed by the postal inspectors and said that the firm never referred patients to Dr. Pincus and that neither were aware of Pincus' padding of bills and did not believe Petitioner was either. When called before the grand

3 John Sochacki was called before the grand jury by the government, sat in the hallway for most of the day and at the end of the day was told by Inspector Morgan that there was no time for Sochacki to be called before the grand jury that day, but that Sochacki would be called at a later date. The government failed to recall Sochacki.

jury, they were only asked questions concerning office procedure and not about the firm's relationship to Dr. Pincus.[4] Supporting affidavits were attached to a motion to dismiss the indictment for failing to present this evidence to the grand jury which was denied by the lower court without opinion.

The inherent right of the grand jury to refuse to indict is firmly imbedded in law. Just as the prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or no bill. Lord Shaftesbury's Case, 8 How. St. Tr. 770 (1681); Ex Parte Bain, 121 U.S. 1

4 Antoinette Ferri was employed from June 1971 thru April 14, 1980; Denise Stroup was employed from Sept. 1971 until Oct. 20, 1980. Both worked closely with Petitioner, acknowledged their presence when clients went over Dr. Pincus' bills and medical reports at various times and at settlement with full awareness of the amounts involved without any challenge to the dates listed for treatment or the amount.

(1887); Woods v. Georgia, 370 U.S. 375 (1962).

The announced policy of the Department of Justice to require the United States Attorney to present exculpatory evidence to the grand jury is obviously intended to give meaning to this right of the grand jury. United States Attorney's Manual 9-11.334.

The American Bar Association Standards Relating to the Prosecution Function 3.6(b), requiring the prosecutor to present evidence which tends to negate guilt to a grand jury, supports the right by making it an ethical consideration for the prosecutor.

While a prosecutor has the right to exercise some discretion and selectivity in the presentation of evidence to a grand jury, he does not have the right to mislead it or engage in fundamentally unfair tactics before it. When he is

aware of any substantial evidence negating guilt, he should in the interest of justice, make it known to the grand jury. United States v. Ciambrone, 601 F.2d 616 (C.A. 6, 1979).

When the totality of circumstances is considered here, including the clear obligation of the prosecutor and the clearly exculpatory nature of the omitted evidence, this case presented a proper occasion for the exercise of the court's supervisory power.

The grand jury places great trust in the United States Attorney. He is not only a representative of the Executive seeking an indictment, he is a representative of the United States, who is looked to by the grand jury for an unbiased presentment. Their trust was misplaced in this case. The indictment should, therefore, have been dismissed. The court of appeals declined to discuss

the issue.

REASONS FOR GRANTING THE WRIT

I. The court of appeals' decision upholding the admission of Dr. Rosenbloom's testimony very early in the case, without balancing the probative value against the prejudicial effect on the record, where Rule 403, F.R.E. was properly raised and the failure to give limiting instructions was in conflict with decisions of another court of appeals on the same matter; this case involves an important question of federal law which has not been, but should be settled by the Supreme Court.

The weighing process under Rule 403 should be conducted explicitly on the record. United States v. Robinson, 530 F.2d 1076, 1081 (D.C. Cir. 1976), United States v. Dwyer, 539 F.2d 924 (2 Cir. 1976), Contemporary Mission, Inc. v Famous Music Corp., 557 F.2d 918,928

(2 Cir. 1977). See Miller v. Poretsky, 595 F.2d 780, 794 - 795 (D.C. Cir. 1978):

> "Speaking in the context of trial-court authority to admit or exclude hearsay reputation testimony, the Supreme Court had admonished that 'wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse.' Michelson v. United States, 335 U.S. 469, 480-481 (1948). The Court went on to praise the trial court's careful consideration of appropriate factors. Id. at 481. The best evidence that a trial court has properly exercised its discretion is explication on the record of his reasons for acting." Id. note 40.
>
> "To play fair a trial judge relying upon discretionary power should place on the record the circumstances and factors that were crucial to his determination. . .so that counsel and the reviewing court will know and be in a position to evaluate the soundness of his decision." Id. note 41.
>
> "[The court] recognizes fully the value of limiting instructions and contemplates that in reaching a decision whether to exclude on the grounds of unfair prejudice, consideration will be given to the probable effectiveness or lack of effectiveness of a limiting instruction," citing advisory committee note to F.R.E. 403, Id. note 49.

United States v. Halper, 590 F.2d 422, 431-432 (2 Cir. 1979) refused to allow the government to join for trial or use as "similar acts evidence", alleged income tax evasion and business medicaid fraud of defendant over the government's urging that it showed defendant's intent to enrich himself by filing false documents with government agencies. The court stated that when dealing with intent, under normal circumstances, prior similar acts should not be admissible in the government's direct case. The court observed that the exceptions allowing admission of proof of prior criminal acts have grown in number to the point of now engulfing the rule. The court required the government to demonstrate the relevance of "similar acts evidence", to an issue truly in dispute; and if relevant, the trial court must weigh the probative value of the evidence against

its prejudicial consequences before admitting it.

There is disagreement as to whether Rule 404(b) is inclusionary, United States v. Long, supra, United States v. Beechum, 582 F.2d 898 (5 Cir. 1978) cert. denied 440 U.S. 920 (1979) or whether "similar acts evidence" is exclusionary as it was under the common law and inadmissible unless substantially relevant for some purpose other than to show bad character. United States v. Phillips, 599 F.2d 134 (6 Cir. 1979). Still other courts have placed particularized limitations on the scope of relevance and require that the evidence proffered meet more exacting standards of reliability and proof before ever reaching the issue of whether the evidence falls within an exception to the rule of exclusion or serves a purpose other than to show the defendant's propensity to act in a criminal

matter. United States v. Silva, 580 F.2d 144 (5 Cir. 1978) required a substantial need for the probative value of the evidence to be plain, clear and convincing of a similar offense. United States v. Bronco, 597 F.2d 1300 (9 Cir. 1979) required clear and convincing evidence of other crimes to prove intent and that the probative value outweighs any potential prejudice.

Even when following an inclusionary approach, some courts have limited admissibility of other crimes evidence to cases where it was "relevant to an actual issue". United States v. Manafzadeh, 592 F.2d 81 (2 Cir. 1979). The court stated that there is no presumption that such other crimes evidence is relevant, and required the exclusion of the evidence unless its probative value to an issue is not outweighed by its unfair prejudice.

Under each of the above approaches,

a proper analysis under Rule 404(b) would require the court to weigh the probative value of the evidence against its prejudicial impact according to Rule 403.

The fear that an overzealous prosecutor will seek to admit all other crimes evidence, thereby threatening the defendant's right to be protected from evidence which is unduly prejudicial was vigorously expressed in United States v. Coades, 549 F.2d 1303 (9 Cir. 1977).

In United States v. Beechum, supra, 5 judges joined in a dissenting opinion that the court was erroneously weighing the probative value against the prejudicial effect and allowing the testimony only to the minimal Rule 104 standard, i.e., where a reasonable jury might find the defendant committed the crime, arguing, that this is contrary to the evidence required under Rules 608 and 609. The dissenters point out

that even the majority implies that the extrinsic offense evidence submitted allegedly to show intent is really just bad character evidence in sheep's clothing. The majority opinion found it significant that the trial court gave extensive limiting instructions to the jury on the limited use of extrinsic offense evidence employed to prove unlawful intent admonishing the jury, that they must first find that the other evidence standing alone establishes beyond a reasonable doubt that the defendant committed the act alleged in the indictment. Petitioner, did not receive any limiting instructions at the time that the testimony was offered, nor were the limiting instructions, when finally given at the conclusion of the trial, sufficient to overcome the prejudice. (TR-1327)

There is a need for clarification of Rules 403, 404(b) requiring a clear

pronouncement by the Supreme Court to insure the uniformity of law which the Federal Rules of Evidence seek to establish.

II. The court of appeals' decision which upheld the material prejudicial variance has decided a federal question in conflict with applicable decisions of this Court; the decision is in conflict with the decision of another court of appeals on the same matter.

Rule 8(a) permits a single indictment to contain multiple related offenses, provided that each count contains only one offense. Two or more separate and distinct offenses in one count subjects an indictment to dismissal because a duplicitous count renders it impossible to ascertain that the defendant's Fifth Amendment grand jury rights were protected. United States v. Gibson, 310 F.2d 79 (2 Cir. 1962); Bins v. United

States, 331 F.2d 390 (5 Cir. 1964).

Although a variance in charging one conspiracy and proving two is not necessarily fatal, it is where the defendant suffers prejudice as a result. Kotteakos v. United States, supra. It is respectfully submitted that there was a fatal variance between the indictment and the proof.

III. The court of appeals' decision upholding the mail fraud counts has decided a federal question in conflict with applicable decisions of this Court; in particular, United States v. Maze, supra.

The three major exclusions from the prosecutable mailings under 18 U.S.C. 1341,1 are mailings sent after the scheme reaches fruition; mailings which are legally compelled; and mailings which tend to increase the chance of discovery of fraud. Petitioner's arguments have been previously set forth in detail.

IV. The court of appeals' decision in upholding the search of Petitioner's law office where the warrant lacked sufficient particularity and probable cause has rendered a decision in conflict with the decision of another court of appeals on the same matter; has decided a federal question in a way in conflict with applicable decisions of this Court.

United States v. Abrams, 615 F.2d 541, 549 (1 Cir. 1980) held that a search warrant violated the Fourth Amendment requirement that medical records to be seized must be particularly described with a time limitation. The warrant failed to meet the requirement of particularity since the officer's discretion was unfettered. There was no attempt to distinghish bona fide records from fraudulent ones and all of the records were seized. The court discusses the Supreme Court's decision in Andresen

v. Maryland, supra, that the Supreme Court carefully limited the search to a particularized one of seizure of evidence relating to ". . .the crime of false pretenses with respect to Lot 13T." Id. 615. The concurring opinion finds a dilemma wherein no Supreme Court case has fully confronted the question whether a warrant is sufficiently particular if it identifies the documents to be seized solely or largely in terms of their character as evidence of the fraud under investigation. He believes that a criminal warrant can not properly direct the seizure of each Medicare-Medicaid patient's entire file in a doctor's office, with its mix of relevant and irrelevant materials, because even though the warrant informs the executing officer precisely what to take, it would violate the probable cause requirement of the Fourth Amendment since it would also permit the indiscriminate

seizure of irrelevant innocent materials of a confidential nature, concluding that the law is still largely unformed in this difficult area and requires Supreme Court guidance. See Pieper v. United States, 604 F.2d 1131 (8 Cir. 1979) (a search warrant for the inspection of business records must express with particularity the dates of the records sought).

V. The court of appeals' decision in upholding the government's refusal to submit exculpatory evidence to the grand jury has decided a federal question in conflict with the decision of another court of appeals on the same matter; has decided an important question of federal law which should be clarified by this Court.

United States v. DeMarco, 401 F Supp. 505 (C.D. Col. 1975) held that the prosecutor's failure to inform the grand jury on information material to its deter-

mination hearing on colorable claims that the motives in bringing the indictment are suspect was sufficient to dismiss the indictment. Referring to Costello v. United States, 350 U.S. 359, 362 (1956) the court stated:

> ". . .grand juries are pledged to indict no one because of prejudice. Thus if the grand jury's function to stand between the accuser and the accused is to be safeguarded, it is necessary to impose a duty upon the government to reveal to the grand jury information bearing on colorable claims that its motives are suspect.
>
> Whether this duty be based upon the grand jury provisions of the fifth amendment or the due process clause of the fifth amendment, or in the exercise of this court's supervisory jurisdiction (Bursey v. United States, 466 F.2d 1059 (9 Cir. 1972), it must be imposed." Id. 514

See United States v. Basurto, 497 F.2d 781, 786 (9 Cir. 1974); Johnson v. Superior Court, 15 Cal.3d 248, 539 P.2d 792 (1975) dismissed an indictment because the prosecutor had failed to inform

the grand jury of known exculpatory evidence. Other cases have recognized that indictments could be dismissed on such grounds, but found that the omitted evidence was not sufficiently significant to require dismissal. United States v. Mandel, 415 F. Supp. 1033, 1042 (D. Md. 1976).

CONCLUSION

For the reasons discussed above, Petitioner, Robert A. Lebovitz, Esquire, requests a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Herbert B. Lebovitz
Robert A. Lebovitz
Attorneys for Petitioner

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1612

UNITED STATES OF AMERICA

v.

ROBERT A. LEBOVITZ,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 80-00148)

Submitted Under Third Circuit Rule 12(6)

October 26, 1981

Before: ADAMS, VAN DUSEN and SLOVITER,
Circuit Judges

(Opinion filed January 21, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Robert Lebovitz was convicted of thirteen counts of mail fraud in violation of 18 U.S.C. §1341 and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. §371. The indictment alleged a conspiracy between Lebovitz, a lawyer, and others to defraud insurance companies. The government evidence showed that Lebovitz and another lawyer in his firm, Lewis Kwall, conspired to submit inflated medical bills to insurance companies in connection with claims made on behalf of Lebovitz' clients for payment of their medical expenses and for compensation for their personal injuries. Fraudulent medical bills were provided by Dr. Jack H. Pincus. The jury convicted Lebovitz on all charges alleged in the indictment. He was sentenced to concurrent prison terms of one year and one day, and was fined a total of $14,000 plus costs of prosecution.

On appeal, he raises several issues including: (1) whether the mailings charged and proven in Counts 5, 10, 13 and 14 were sufficiently related to the fraudulent scheme to support the mail fraud convictions on those counts; and (2) whether the district court erred in ad-

mitting the testimony of a prosecution witness under Federal Rule of Evidence 404(b) without an express determination that its probative value outweighed its prejudicial effect. We affirm.

I.

Mail Fraud

The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud.[1] 18 U.S.C. §1341. Whether a mailing is "for the purpose of executing a scheme" within the meaning of §1341 depends upon whether it is "sufficiently closely related to respondent's scheme to bring his conduct within the statute." *United States v. Maze*, 414 U.S. 395, 399 (1974); *United States v. Brown*, 583 F.2d 659, 664 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). The completion of the scheme must depend in some way on the mailings charged. *United States v. Brown*, 583 F.2d at 664; *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977). However, "[i]t is not necessary that the

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1. Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8 (1954), *quoted* in *United States v. Maze*, 414 U.S. at 400. Rather, it is sufficient if the mailing is "incident to an essential part of the scheme." *Pereira v. United States*, 347 U.S. at 8. *See United States v. Adamo*, 534 F.2d 31, 36 (3d Cir.), *cert. denied*, 429 U.S. 841 (1976) ("It is enough that the use of the mails merely furthers the scheme. . . ."); *United States v. Giovengo*, 637 F.2d 941, 944-45 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 1743 (1981) (applying *Pereira* test to wire fraud statute).

Use of the mails after the object of the scheme has been accomplished is not sufficiently closely related to the scheme to support a mail fraud conviction. *United States v. Brown*, 583 F.2d at 664. However, the object of a scheme is not necessarily accomplished at the moment when the perpetrator of the fraud receives the fruits of the scheme. *Id.* In some cases, subsequent mailings may still be "for the purpose of executing" the scheme because they are, for example, "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Maze*, 414 U.S. at 403. *See United States v. Sampson*, 371 U.S. 75, 80-81 (1962).

In the counts which Lebovitz does not challenge as insufficient to support the mail fraud charges, the mailings generally related to the claims presented by Lebovitz on behalf of his clients for medical payments and personal injuries. In the four counts which are challenged, Counts 5, 10, 13 and 14, the mailings were related to third-party claims asserted by the original defendants against the plaintiff drivers alleging the drivers were totally or partially liable for the injuries to their own passengers. The plaintiffs' liability carrier, not Lebovitz, represented the plaintiff drivers as third party defendants.

Lebovitz contends that all of the claims involved in his scheme "were directed to either the medical payment carrier or the liability carrier representing the original defendant" and therefore the mailings in the four challenged counts were not closely enough related to the scheme to bring the conduct within the statute. Brief for Appellant at 20. Thus, we must decide whether the mailings in connection with the third-party complaints can support the mail fraud convictions on those counts. We must view the evidence in the light most favorable to the government. *United States v. Brown*, 583 F.2d 659, 661 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). *See Glasser v. United States*, 315 U.S. 60, 80 (1942).

Counts 10, 13 and 14.

These counts alleged three mailings arising out of an accident between John Sochacki, the driver of one car, and Michael Joyce, driver of the second car. Lebovitz represented Sochacki and his passenger, Joan Posa, in their medical payment claims against Sochacki's own insurer, J.C. Penney Insurance Company, and in their personal injury suit against the driver of the other car, Michael Joyce, who was represented by Allstate Insurance Company. The medical payment claims were based on the inflated medical bills from Dr. Pincus and the damages claimed in the personal injury suit also included those bills. Joyce, through his insurer, Allstate, joined Sochacki as an additional defendant on the Posa claim. Sochacki's insurer, J.C. Penney, defended this third-party claim. The evidence at trial showed that J.C. Penney paid Sochacki $985.20 and Posa $1,701.23 on their medical payment claims; that Allstate settled the personal injury claim of Sochacki for $1,000 and of Posa for $3,000; and that J.C. Penney paid Posa $[illegible]00 on behalf of third-party defendant Sochacki.

The mailings used to support the mail fraud charges were letters between Lebovitz' law firm, representing

Sochacki and Posa as the original plaintiffs, and the attorney for J.C. Penney, representing Sochacki as the additional defendant on the Posa claim. To support Count 10, the government relied on a letter from Kwall, of Lebovitz' law firm, to J.C. Penney's attorney enclosing Sochacki's and Posa's Pretrial Statement which consisted of a list of special damages including the inflated medical bills. Government Trial Exhibit XI(I). Count 13 was supported by a letter from Lebovitz to J.C. Penny's attorney in connection with the settlement, and included Posa's releases of Sochacki, defendant in the third-party claim, for the $1,000 settlement from J.C. Penney on behalf of Sochacki. Government Trial Exhibit XI(L). Count 14 was supported by a letter from J.C. Penney's attorney to Lebovitz enclosing the $1,000 settlement check. Government Trial Exhibit XI(M).

Lebovitz argues that there is no evidence that the joinder of the additional defendant or the recovery of money from an additional defendant was within his contemplation or part of the scheme or that the success of the scheme depended upon the mailings to or from the attorney for the additional defendant. However, the relationship between the personal injury claim filed by Lebovitz for his clients Posa and Sochacki and the third-party claim filed by defendant's insurer against Sochacki is apparent from the mailing which showed that Lebovitz negotiated and processed at the same time the settlement from Allstate for Posa and Sochacki as original plaintiffs and the settlement from J.C. Penney on behalf of Posa against Sochacki. Further, there was sufficient evidence for the jury to find that at the time of the settlement negotiations, Lebovitz' damages claims were still based upon, in part, Dr. Pincus' inflated bills. Thus, the jury could have concluded that at the time of the mailings charged in Counts 10, 13 and 14 Lebovitz was attempting to fraudulently obtain money from both the original defendant's insurer and the additional de-

fendant's insurer, that the object of his scheme had not yet been fully accomplished, and that the mailings furthered the resolution of the third-party claims. The scheme "depended" in that way upon the mailings for its furtherance. *See United States v. Brown*, 583 F.2d at 664; *United States v. Adamo*, 534 F.2d at 36.

Lebovitz' contention that he never controlled or contemplated the joinder of additional defendants is also without merit. The law is clear that "one 'causes' the mails to be used where he 'does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . .'" *United States v. Maze*, 414 U.S. at 399 (quoting *United States v. Pereira*, 347 U.S. at 8-9). The evidence in the present case amply supports a finding that Lebovitz reasonably foresaw the joinder of additional defendants and subsequent mailings involving those defendants. In connection with one of the other claims, Lebovitz himself testified:

> I was asked does an insurance company in every instance join somebody as a third-party defendant. I said to you when they have a justification [sic] basis, they would join somebody as a third-party defendant, but its improper if they did it in every case.
>
> Now, if you are asking me on evaluation of this case was I shocked that Sharon Campbell was joined as an additional defendant, I wasn't shocked. This can happen.

App. 1203-04. The trial court gave, in substance, the charge requested by defense counsel. It instructed the jury:

> Use of the United States mails in furtherance of a scheme to defraud is an essential element of the offense charged. It is not necessary that the use of the mails by the defendant himself be contemplated, or

> that a defendant do any actual mailing or that a defendant specifically intends that the mails be used. It is sufficient if the use of the mails by somebody else, such as a doctor, lawyer, a claim agent, or an insurance company, was reasonably foreseeable in the preparation or settlement of an accident case in litigation.
>
> It is only necessary that the defendant could reasonably foresee that the mails would be used in furtherance of the scheme.
>
> The gist of the offense of mail fraud is the use of mails by someone to carry out some essential element of the fraudulent scheme or artifice.

App. 1324-25. Defendant does not contend that the charge was erroneous. We find that there was sufficient evidence from which the jury could have found the requisite nexus between the mailings and the conduct charged in Counts 10, 13 and 14.

Count 5.

The relationship between the scheme and the mailing relied upon to support Count 5 is less readily apparent. Lebovitz represented the driver, Sharon Campbell, and her mother, Anne Baumeister, a passenger in the car, when it was involved in an accident with a car driven by Louise Corradini in May, 1974. Both Campbell and Baumeister were covered by medical payment insurance with Nationwide Insurance Company, which provided that if they were injured in an automobile accident, Nationwide would pay their medical expenses regardless of fault or liability. Campbell also had separate liability coverage with Nationwide. Lebovitz sought recovery from Nationwide for the medical expenses of Campbell and Baumeister and, in this connection, he submitted the fraudulently inflated medical bills from Dr. Pincus. The medical payment claim was paid on December 16, 1974.

Lebovitz also represented Baumeister and Campbell in their personal injury claims against Corradini and filed suit on their behalf. INA, Corradini's insurance carrier, defended the suit. It filed a third-party claim to Baumeister's complaint joining Campbell as an additional defendant, on the ground that Campbell was totally or partially liable for Baumeister's injuries. Nationwide, not Lebovitz, defended the third-party claim for Campbell under the liability portion of her coverage.

The mailing used to support the Count 5 mail fraud charge was a letter dated August 18, 1976 from Nationwide's trial attorney to the Nationwide claims attorney enclosing Baumeister's answers to interrogatories, her itemized list of special damages which included an inflated medical bill from Dr. Pincus, and a copy of the inflated bill itself. Government Trial Exhibit X(J). Lebovitz argues that Nationwide's only continued interest in the case concerned the claim of the original defendant, Corradini, against the additional defendant, Campbell, which claim had been asserted by Corradini's attorney, not Lebovitz. Further, he asserts, that because the object of Lebovitz' scheme was accomplished when he received the check of December 16, 1974, the mailing was not sufficiently related to the scheme to support a mail fraud conviction.

Lebovitz' argument is predicated on the assumption that no reasonable jury could find the necessary nexus between his scheme and the third-party complaint. However, as in the Sochacki/Posa claim, evidence on record supports such a nexus. Lebovitz continued to represent Campbell and Baumeister in their personal injury claims at the time the August 18, 1976 letter was sent, and their personal injury claims relied in part on Dr. Pincus' inflated medical bill. During the pendency of the personal injury claims, Lebovitz wrote a letter dated October 6, 1977 to trial counsel for Nationwide, the insurer of the third-party defendant which stated, in part,

> I would appreciate your looking into this matter with Nationwide and advising me if you are in a position to offer a contribution on behalf of anv negligence for Sharon Campbell in this matter, in order that we can attempt to amicably resolve this matter due to Mrs. Baumeister's condition.

Government Trial Exhibit X(K). Lebovitz' own testimony at trial supports a finding that the scheme was ongoing:

> LEBOVITZ: In your letter, you are asking me about Exhibit X-K, we were trying to get some money out of Nationwide if they would pay it, but they didn't want to pay it.
>
> PROSECUTOR: So you were trying to get money out of Nationwide Insurance, so they still had an interest in the case, and you still had an interest that Nationwide was involved.
>
> LEBOVITZ: I can see they had some interest in the case as to Anne Baumeister. . . .

App. 1211.

Samuel A. Bruno, the Nationwide claims attorney to whom the August 18, 1976 letter was addressed, testified that his authorization was required before any settlement could be approved, App. 27; *see* App. 545, that medical payments are a factor in such settlement evaluations, App. 36-38, and that the inflated bill prepared by Dr. Pincus and transmitted to him with the August 18, 1976 letter became part of his permanent file and "helps us to try to evaluate the case for settlement" App. 44; *see* App. 546. Under these circumstances, we cannot hold as a matter of law that the mailing on August 18, 1976 relating to the third-party claim was not incident to an essential part of Lebovitz' scheme, which the jury could have viewed as settlement of all of the claims of

Lebovitz' clients, and therefore sufficiently related to Lebovitz' scheme to support a mail fraud conviction.[2]

II.

Admissibility of Dr. Rosenbloom's Testimony

Lebovitz contends that the court erred in admitting the testimony of Dr. Meyer Rosenbloom. Dr. Rosenbloom testified that at Lebovitz' request he had prepared inflated medical bills for services to Lebovitz' clients during the period from approximately 1970 to 1975.[3] Dr. Rosenbloom's testimony was particularly significant because Dr. Rosenbloom testified to direct contact with Lebovitz, unlike Dr. Pincus, whose direct con-

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2. It is also possible that even if Lebovitz' contention were accepted that his scheme was complete upon receipt of the medical payments from Nationwide, Campbell's insurer, the jury nevertheless could have found that it continued as to INA, Corradini's insurer. As this court noted in United States v. Brown, "[a subsequent] letter to a victim may be used to aid a scheme which contemplated a series of fraudulent acts. In such a case, a mailing may be used to give a fraudulent business the appearance of legitimacy or otherwise to postpone inquiry and action by former victims so that the scheme may continue." 583 F.2d at 664 (citations omitted). Thus the letters involving Nationwide could have aided Lebovitz in his next fraudulent act in a series, which was the personal injury claim against the original defendant's insurer based upon the same inflated medical bills.

3. Dr. Rosenbloom testified in part:

Q Who indicated to you that the bill should be inflated?

A The word inflation never occurred to me, but that is what we were doing. But I would say I have a bill for $150, and [Lebovitz] would say something that the patient may have said he had come more frequently and that a bill for $350 was necessary, or was inferred or implied by the patient.

Q [Lebovitz] would indicate to you the amount to put on your bill?

A Yes.

tact was with Kwall. Because the acts to which Dr. Rosenbloom testified were outside the period of the statute of limitations, they were not relied upon by the government to support the conviction.

In response to defendant's objection to the admission of Dr. Rosenbloom's testimony, the government offered that testimony under alternate theories of admissibility — that the testimony would be connected to the alleged conspiracy, App. 76-86, or that it was admissible under Rule 404(b) of the Federal Rules of Evidence "to show that the defendant had knowledge of the scheme and that he carried it out with other individuals and shows intent and is a hundred percent probative in that regard of doing the same thing with other people and indicates that the scheme charged in the indictment did,

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NOTE — *(Continued)*

App. 98.

3.

* * *

Q Who would make the determination as to whether the bill would be inflated or not?

A Mr. Lebovitz.

Q And during the discussions were you aware of what basis he was making to make that decision?

A No.

Q Would he indicate to you the type of accident involved or the seriousness of the injury, something like that?

A No, not really. It was just that he would say there would be $350, this one is $400.

App. 105-06.

* * *

Q Would you have indicated to the defendant the number of visits that the patient had actually been seen?

A Would I?

Q Yes.

A Yes.

in fact, exist." App. 87. The court recessed and then overruled the defendant's objections to the admissibility of Dr. Rosenbloom's testimony without giving a specific reason. App. 89-90. Defendant requested no limiting instruction.

Three trial days thereafter the court stated that since the defendant failed to ask for a bill of particulars to identify the other conspirators, the court would ask the government who the other persons were. In response, the government stated that the evidence would support an instruction limiting the conspiracy to Lebovitz, Kwall, and Dr. Pincus, "and that the government is prepared to request or recommend to the Court that limited [sic] instructions be given to the jury that the testimony of Dr. Meyer A. Rosenbloom is admitted for a limited purpose under Rule 404(b) of the Federal Rules of Criminal Procedure [sic] bearing on the ques-

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Q And would Attorney Lebovitz then suggest to you that you inflate the amount of money and number of visits?

A Arrive at a figure, yes.

Q How would you know what dates to put down for the visits?

A We just picked them off the calendar.

Q We? Who do you mean?

A Mr. Lebovitz and I.

Q He would indicate to you dates and you would put them down?

A Many times.

App. 106-07.

As to one accident, Dr. Rosenbloom testified that he actually treated the patient on two visits, but the report and bill which he prepared in concurrence with Lebovitz indicated 28 treatments. App. 116-18. On another occasion, he treated a patient on one visit, but after he received a letter from Lebovitz which stated, *inter alia*, "I understand you have been treating Carlton [the patient] frequently and that he has seen you approximately thirty-five times since December 12, 1970." Dr. Rosenbloom prepared a bill indicating 39 visits. App. 121-24.

tion of intent or knowledge of the defendant insofar as the scheme carried out as charged in the mail fraud indictment, but that the testimony of Dr. Meyer A. Rosenbloom is not to be considered with respect to whether the defendant actually conspired with Meyer A. Rosenbloom to violate the conspiracy act as charged." App. 806-07. No limiting instruction was given at that time, and the trial continued.

At the conclusion of the testimony defendant moved for a mistrial based on the admission of the testimony by Dr. Rosenbloom, which was denied. Lebovitz argues on appeal that since the government conceded that Dr. Rosenbloom could not be connected to the conspiracy with Lebovitz and Dr. Pincus, the only basis for admitting Dr. Rosenbloom's testimony was under Rule 404(b), and that the court's failure to make an express balancing on the record under Rule 403 that the probative value of the evidence outweighed its prejudicial effect compels a reversal.

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In United States v. Long, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978), this court considered whether the trial court's admission of evidence without making explicit the balancing required under Rule 403 required a reversal. In considering the appellant's claim, we noted that the trial court is given a very substantial discretion in balancing "probative value" on the one hand and "unfair prejudice" on the other. *Id.* at 767. Judge Adams, in his concurring opinion, expressed his concern that the trial court's failure to balance on the record made it difficult for an appellate court to determine whether there has been an exercise of discretion or a mistake. *Id.* at 770. The majority in *Long* also agreed that "[w]here an objection does invoke Rule 403, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal." *Id.* at 766 (footnote omitted). In this case, although appellant's counsel did not expressly refer to Rule 403 by name, he nonetheless did argue that the testimony was prejudicial and thus it is evident to us that this was an appropriate case in which the trial court should have articulated the factors considered in balancing the probative value against the unfair prejudice.

When faced with the failure of the trial court to undertake the articulated balancing which this court has on numerous occasions directed, *id.*; *see United States v. Provenzano*, 620 F.2d 985, 1003 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980) (in context of Rule 609 balancing), we have followed two paths. In some instances we have determined that the trial court implicitly made the requisite balancing. *See United States v. Provenzano*, 620 F.2d at 1003. In other instances, we have undertaken to examine the record ourselves. *See Carter v. Hewitt*, 617 F.2d 961, 972-73 (3d Cir. 1980). We reiterate that such balancing should be performed in the first instance and on the record by the trial court who

is in the best position to determine the weight to be given the various relevant factors.[4]

In this case it is apparent that the trial court considered that Dr. Rosenbloom's testimony was highly probative of the defendant's intent. In its subsequent analysis of the admissibility of such evidence when ruling on the motion for a mistrial, the trial court rejected defense counsel's contention that Dr. Rosenbloom's testimony was admitted because of the conspiracy charge. The court stated, "He was testifying as to the defendant's intent. For years, he kept inflating bills and continued to do it for Dr. Pincus. That was the only purpose that I could see." App. 1285. In light of Lebovitz' assertions throughout the trial that he had not dealt directly with Dr. Pincus and that he had not known that the medical bills were inflated when he used them, *see, e.g.*, App. 978-79, 1066, 1070-71, Lebovitz' knowledge and intent with regard to inflated medical bills used to support the claims of his personal injury clients clearly had probative value as to his state of mind in dealing with Dr. Pincus. We see no reason why admission of such evidence would be "unfair", *see Carter v. Hewitt*, 617 F.2d at 972-73, since the time periods during which Drs. Rosenbloom and Pincus submitted their inflated bills were not far apart and the *modus operandi* in connection with each was not so dissimilar as to cause the jury to base its decision on extraneous factors. Therefore, we cannot say that the trial court erred in admitting Dr. Rosenbloom's testimony.

We have carefully considered the other contentions raised by Lebovitz, that the evidence which showed two unrelated conspiracies fatally varied from the indictment which charged a single conspiracy, that the warrant for

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4. We also suggest that the Assistant United States Attorneys who proffer the challenged evidence should call to the attention of the trial court the need to make explicit on the record the requisite balancing.

the search of Lebovitz' office was issued without sufficient probable cause and was a general search in violation of the Fourth Amendment, and that the indictment should have been dismissed because the prosecutor failed to produce evidence negating guilt to the grand jury, and have concluded that none of them present any basis for reversal of the judgment of conviction.

For the foregoing reasons, we will affirm the judgment of the district court.

ADAMS, J., concurring.

While I concur in Judge Sloviter's opinion, I write separately to emphasize my concern regarding the continuing uncertainty in the application of Federal Rule of Evidence 403. The rule, which accords the trial court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," is often used in conjunction with Rule 404(b) to admit potentially prejudicial evidence of prior "bad acts." *See United States v. Cook*, 538 F.2d 1000, 1003-04 (3d Cir. 1976). Admittedly, the realities of trial preclude a detailed exegesis by the trial judge of the decision to admit or exclude relevant, prejudicial evidence. But the *exercise* of a judge's discretion requires just that — exercise, application, overt action. Thus, as I urged in *United States v. Long*, 574 F.2d 761 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978), and as the majority suggests here, the trial court should make certain that in ruling on an objection premised on Rule 403, the record reflect "some reckoning of the balance between relevance and prejudice and the alternatives available for the substitution of less prejudicial proof." *Id.* at 770. This is an oft-repeated admonition, not only in our Court, but in a number of other circuits as well. *See, e.g., Miller v. Poretsky*, 595 F.2d 780, 794 & n. 40-41 (D.C. Cir.

1978); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976); *United States v. Robinson*, 530 F.2d 1076, 1081 (D.C. Cir. 1976). *See generally* J. Weinstein & M. Berger, *Evidence* ¶403[02], at 404-14 to -15 (1980 & Supp.). The point bears reiteration in the case before us today.

Put simply, an appellate court should not be expected to strike the correct balance between prejudice and probativeness in the Rule 403 context. Such an analysis, at least when undertaken by an appellate court in the first instance, necessarily entails considerable after-the-fact speculation. For example, the view of the appellate judges may differ significantly from that of the trial judge, who can assess the credibility of the witnesses and the potential impact of their testimony, in light of the entire environment of the trial. Faced with a barren or inadequate record, however, an appellate court — unable to determine whether the trial judge has used, let alone abused, his or her discretion — has limited choices: it can reverse and remand the case, or it can engage in its own balancing process. Neither alternative is completely satisfactory. Both consume time and limited judicial resources, and, even more important, either choice may result in a misinformed judgment by the appellate court.

In the present case, there is an indication that, in ruling on the objection to Dr. Rosenbloom's testimony, the trial judge was exercising the discretion granted him under Rule 403. The testimony was preceded by a lengthy side bar conference between counsel and the trial judge. While Rule 403 was not mentioned by name, the defense attorney did state that the judge must "determine whether or not [the evidence] is prejudicial, and whether the prejudicial value outweighs the probative value. . . ." Appendix at 87. After the conference, the court was recessed for ten minutes while the judge considered the issue. When the trial resumed, the judge an-

nounced his ruling, but did not explicitly set forth on the record either the probative worth of Dr. Rosenbloom's testimony or the possibility of unfair prejudice. From this, the majority concludes — and I cannot disagree — that the trial judge's decision was the result of a proper exercise of discretion.

The fact that the Court today is willing to infer from the record what preferably should have been made explicit at trial, however, does not obviate the risk that district judges take when they neglect to indicate, in some fashion, the basis for an evidentiary ruling under Rule 403. At best, the appellate tribunal is forced to second-guess the trial judge in such a situation. At worst, an improperly documented Rule 403 ruling may be cause for a reversal and remand. Accordingly, defense attorneys should clearly invoke Rule 403, either by name or by reference to its contents, when objecting to potentially prejudicial evidence. Trial judges likewise should indicate on the record that they have engaged in the requisite balancing process.

With this caveat I join in the opinion of the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX A

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

United States of America
vs.
Robert A. Lebovitz

Docket No. 80-148 Criminal

JUDGMENT AND PROBATION/COMMITMENT ORDER

PLEA: Not Guilty

FINDING: There being a finding/verdict of Guilty.

JUDGMENT: Defendant has been convicted as charged of the offense(s) of Ct. 1 - Conspiracy 18 USC 371 Cts. 2-14 - Using mails to defraud the U.S. 18 USC 1341 & 2

SENTENCE: As to count one, the defendant is hereby committed. . .for imprisonment for a period of one (1) year and one (1) day and directed to a fine of $7,500 and the costs of prosecution.

Counts 2 through 14 - It is directed that the defendant be committed. . .for imprisonment for a period of one (1) year and one (1) day as to each of the 13 counts, and

a fine of $500 as to each count and remain in prison until the fines and costs are paid or until otherwise discharged in due course of law. The sentence of imprisonment at counts 2 through 14 are to run concurrently with each other and with the sentence of imprisonment imposed at count 1. The total fine is $14,000.

SIGNED BY: U.S. District Judge
Rabe F. Marsh

DATED: March 5, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1612

UNITED STATES OF AMERICA

v.

ROBERT A. LEBOVITZ,

Appellant

Sur Petition for Rehearing

EN BANC

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by Appellant, Robert A. Lebovitz,

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Dolores K. Sloviter
Circuit Judge

Dated: February 11, 1982

APPENDIX A
23 a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1612

UNITED STATES OF AMERICA
v.
LEBOVITZ, ROBERT A.,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until March 20, 1982.

Dolores K. Sloviter
Circuit Judge

Dated: February 19, 1982